

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF )  
DENTISTRY, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-2030PL  
 )  
ALEXANDER GAUKHMAN, D.D.S., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On August 26, 2011, an administrative hearing was conducted by video teleconference in Sarasota and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: George A. Black, Esquire  
Wayne Mitchell, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C65  
Tallahassee, Florida 32399-3265

For Respondent: Max R. Price, Esquire  
Law Offices of Max R. Price, P.A.  
6701 Sunset Drive, Suite 104  
Miami, Florida 33143

STATEMENT OF THE ISSUES

The issues in this case are whether the allegations set forth in the Administrative Complaint filed by the Department of Health (Petitioner) against Alexander Gaukhman, D.D.S.

(Respondent), are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated February 15, 2008, the Petitioner alleged that the Respondent violated section 466.028(1)(m), Florida Statutes (2005 & 2006),<sup>1/</sup> and Florida Administrative Code Rule 64B5-17.002(1), related to records maintained during the provision of dental treatment to a patient. The Respondent denied the allegation and requested an administrative hearing. The Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness by deposition and had Exhibits 1 through 3, 5 through 8, 10, and 23 admitted into evidence. The Respondent did not attend the hearing, but was represented by counsel who presented the testimony of one witness. The parties had Joint Exhibit 1 admitted into evidence.

A Transcript of the hearing was filed on September 8, 2011. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order. A pre-hearing stipulation filed by the parties contained stipulations of fact that have been incorporated herein as necessary.

As presented at the hearing, the Petitioner's evidence, including the testimony by deposition, addressed matters related to dates other than those specified in the Administrative Complaint. At the commencement of the hearing, the Respondent objected to consideration of matters not specifically alleged in the Administrative Complaint, and the objection was sustained. The Findings of Fact set forth herein correspond to the allegations set forth in the Administrative Complaint and are based on the evidence presented at the hearing that was relevant to those allegations.

#### FINDINGS OF FACT

1. At all times material to this case, the Respondent was a licensed dentist in the State of Florida, holding license number DN 15657. The Respondent's mailing address of record was 400 Hanchey Drive, Nokomis, Florida 34275.

2. Beginning on February 28, 2006, and continuing through January 10, 2007, the Respondent, or persons in his dental office, provided dental care and treatment to Patient S.K. (Patient), a female approximately 46 years of age.

3. According to the Respondent's records, the woman presented to the Respondent as a new patient complaining of "severe pain" on February 28, 2006.

4. On that date, the Respondent's records indicate that he performed a limited examination that included taking diagnostic

x-rays. A limited oral examination is appropriate under emergent circumstances where the presenting complaint is severe pain.

5. The Respondent's records contain no written documentation of the Respondent's findings based on his examination of the patient and no written diagnosis of oral pathology or disease.

6. The Respondent performed root canal treatment on the Patient's teeth numbered 8 and 9 and placed crowns on the two teeth.

7. The Respondent's records contain no written treatment plan related to root canal treatment provided to the patient.

8. The Administrative Complaint alleged that the Respondent's treatment notes failed to identify the type or amount of anesthetic used during the root canal treatment. The evidence fails to establish that the Respondent administered anesthetic to the Patient during the root canal treatment.

9. In addition to the emergency root canal treatment performed on February 28, 2006, the Respondent also placed veneers on the Patient's teeth numbered 6, 7, 10, and 11. Placement of prosthetic dental veneers is a cosmetic, not an emergent, procedure.

10. The Respondent's records contain no written record of an examination related to placement of the cosmetic prosthetic

dental veneers, no diagnosis or other information establishing the rationale for placement of the veneers, and no written follow-up plan related to the veneers.

11. The Patient presented for prophylaxis (cleaning) on March 16, 2006, and again on October 10, 2006. The cleaning was performed by a dental hygienist working for the Respondent. According to the Respondent's records, the Respondent examined the patient on those dates. Such an examination would have included periodontal probing to determine the Patient's dental health.

12. The Respondent's records fail to contain any record of a periodontal probing on March 16, 2006, or on October 10, 2006. Other than notation of pockets related to the root canal procedure, the Respondent's records fail to contain any indication that the Respondent performed periodontal probing on the Patient. Such probing is a basic and routine part of an examination to determine dental health. Because the Respondent was providing dental health services to the Patient, it is reasonable to presume that the Respondent performed the probing, but failed to document the process in his records.

13. The Respondent has been previously disciplined by the Petitioner in an unrelated matter that was resolved in 2003.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 & 120.57(1), Fla. Stat. (2011).

15. In this case, the Petitioner is seeking to impose discipline against the Respondent's license. In order to prevail, the Petitioner must demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In order to be "clear and convincing," the evidence must be "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

16. Section 466.028 provides, in relevant part, as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

\* \* \*

(m) Failing to keep written dental records and medical history records justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results, and X rays, if taken.

17. Rule 64B5-17.002(1) provides as follows:

For the purpose of implementing the provisions of subsection 466.028(1)(m), F.S., a dentist shall maintain written records on each patient which written records shall contain, at a minimum, the following information about the patient:

- (a) Appropriate medical history;
- (b) Results of clinical examination and tests conducted, including the identification, or lack thereof, of any oral pathology or diseases;
- (c) Any radiographs used for the diagnosis or treatment of the patient;
- (d) Treatment plan proposed by the dentist; and
- (e) Treatment rendered to the patient.
- (f) Whenever patient records are released or transferred, the dentist releasing or transferring the records shall maintain either the original records or copies thereof and a notation shall be made in the retained records indicating to whom the records were released or transferred. However, whenever patient records are released or transferred directly to another Florida licensed dentist, it is sufficient for the releasing or transferring dentist to maintain a listing of each patient whose records have been so released or transferred which listing also includes the dentist to whom such records were released or transferred. Such listing shall be maintained for a period of 4 years.

18. As set forth herein, the evidence established that the Respondent violated section 466.028 and rule 64B5-17.002(1).

The evidence established that the Respondent failed to contain

written documentation justifying the course of treatment provided to the Patient. The records contained no written documentation of exam findings, no written diagnosis of pathology or disease, and no written treatment plan.

19. The evidence also established that the Respondent's records failed to contain "HIPPA" forms signed by the patient. Such forms are related to privacy of medical information and are required by the federal Health Insurance Portability and Accountability Act of 1996. Although the Administrative Complaint alleged that the failure to maintain the forms was a violation of the statute and rule cited herein, neither the statute nor the rule requires that HIPPA forms be maintained as part of a patient medical record.

20. The Respondent has asserted that the presence of X-rays in the Patient's records was sufficient to diagnose and identify the underlying pathology and to document the course of treatment provided to the patient. However, the rule clearly states that the X-rays are only a portion of the minimum documentation that is required, and, in this case, the Respondent's records are insufficient to meet even the minimal standards set forth.

21. The Respondent has also asserted that, because the Patient presented to him on an emergent basis on February 28, 2006, the record-keeping requirements were somehow lessened.



There is nothing in the rule that indicates that the clear record-keeping requirements are inapplicable when treatment is provided on an emergent basis. And further, the treatment provided by the Respondent on that date was not limited to the emergent root canal procedure, but included placement of cosmetic veneers.

22. Florida Administrative Code Rule 64B5-13.005 sets forth the disciplinary guidelines relevant to this proceeding. Pursuant to rule 64B5-13.005(1)(m), the penalty for a first offense violation of section 466.028(1)(m) ranges from a minimum fine of \$500 to a maximum fine of probation with conditions and a fine of \$7,500. Rule 64B5-13.005 provides, in further relevant part, as follows:

(2) Based upon consideration of aggravating or mitigating factors, present in an individual case, except for explicit statutory maximum and minimum penalty requirements, the Board may deviate from the penalties recommended in subsections (1) above and (3) below. The Board shall consider as aggravating or mitigating factors the following:

(a) The danger to the public;

(b) The number of specific offenses, other than the offense for which the licensee is being punished.;

(c) Prior discipline that has been imposed on the licensee;

(d) The length of time the licensee has practiced;

(e) The actual damage, physical or otherwise, caused by the violation and the reversibility of the damage;

(f) The deterrent effect of the penalty imposed;

(g) The effect of the penalty upon the licensee;

(h) Efforts by the licensee towards rehabilitation;

(i) The actual knowledge of the licensee pertaining to the violation;

(j) Attempts by the licensee to correct or stop the violation or refusal by the licensee to correct or stop the violation; and

(k) Any other relevant mitigating or aggravating factor under the circumstances.

23. There is no evidence that the Respondent presents a danger to the public. There are no allegations related to record-keeping other than those involved in this case. The Respondent has been licensed since 2001. There is no evidence that there was any actual damage caused by the violation addressed herein.

24. The Respondent has a prior disciplinary incident on a matter unrelated to record-keeping. There is no evidence that the licensee has been rehabilitated, that the licensee understands the violation, or that there was any attempt to correct the violation. To the contrary, the Respondent asserted that the record-keeping was appropriate and met the requirements

of the statute and the rule, when the plain English of the rule clearly indicates the contrary. The deterrent effect of a penalty in this case would be presumed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Dentistry enter a final order finding the Respondent in violation of section 466.028(1)(m) and imposing the following penalty:

1. Imposition of a fine of \$2,500.
2. Successful completion of an educational course related to dental record-keeping and passage of the Florida Board of Dentistry Laws and Rules Exam. The Board of Dentistry shall designate the educational course and shall establish the deadlines related to imposition of this penalty.

DONE AND ENTERED this 31st day of October, 2011, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of October, 2011.

ENDNOTE

<sup>1/</sup> References to Florida Statutes are to Florida Statutes (2005 & 2006), unless otherwise indicated.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.